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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 04 222 51017 Office: CALIFORNIA SERVICE CENTER Date: MAR 08 2006

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

We note that the attorney initially involved with the proceeding was H. Samuel Hernandez. The initial filing included Form G-28 Notice of Entry of Appearance as Attorney or Representative, signed by the beneficiary, but not by the petitioner. Thus, Mr. Hernandez was never properly designated as the attorney of record. The appeal includes a properly executed Form G-28 from present counsel, signed by an official of the petitioning district.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a public school district that wishes to employ the beneficiary as a high school mathematics teacher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits copies of previously submitted documents and new arguments from counsel.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the beneficiary, who holds a doctorate in education from Brigham Young University, qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its

report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Jerry Almendariz, a human resources official with the petitioning district, states:

> [The beneficiary] holds full certification as a math teacher in California in the form of a professional Clear Single Subject: Math Teaching Credential. Fully-credentialed math teachers are a valuable commodity and in short supply in the Inland Empire area of Southern California, where communities continue to grow, and subsequent student enrollment increases each year. In addition, [the beneficiary] meets federal and state "No Child Left Behind" subject matter competency requirements in the area of mathematics. This competency will be crucial to continued federal school district funding.
>
> The demographic area of San Bernardino County and of the [petitioning] District will benefit from the continued residence and employment of [the beneficiary].

Various witnesses attest to the beneficiary's professional credentials as a math teacher, and to the shortage of qualified math teachers in the petitioner's vicinity. One of the beneficiary's former professors at Brigham

Young University suggests that the beneficiary "can also influence and help less qualified teachers improve their skills for teaching mathematics."

The controlling precedent decision relating to national interest waivers touches directly on the issue of local teacher shortages: "while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *Matter of New York State Dept. of Transportation* at 217, n.3. More generally, a shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. *Id.* at 215, 218.

On April 19, 2005, the director issued a notice of intent to deny, stating that "the requested waiver primarily rests on . . . a shortage of qualified teachers in the field of Mathematics." The director acknowledged the intrinsic merit of teaching math, but found that the petitioner had not established that the beneficiary's work is national in scope or that adhering to the labor certification process would be contrary to the national interest. The director found that general assertions regarding the beneficiary's competence as a math teacher cannot suffice to show that the beneficiary qualifies for the special benefit of a national interest waiver.

In response to the notice, Mr. Hernandez asserts that the petitioner has addressed the guidelines set forth in *Matter of New York State Dept. of Transportation*. Mr. Hernandez does not acknowledge that precedent decision's findings that a local labor shortage does not warrant a waiver, or that a teacher's classroom activities generally lack national scope. Mr. Hernandez, in fact, stipulates that "a severe shortage of qualified teachers . . . would have ensured approval of a labor certification."

Mr. Hernandez argues that labor certification is inappropriate because, owing to backlogs at the Department of Labor, the beneficiary's H-1B nonimmigrant status will expire before she is able to obtain a labor certification, and because "there is now a priority list for individuals from India in some of the employment based categories." Thus, by Mr. Hernandez's reasoning, there would be less justification for a waiver if the beneficiary had identical credentials but was Portuguese and in her first year as an H-1B, rather than an Indian nearing the expiration of her status. We cannot make the waiver contingent on the beneficiary's nationality or on the petitioner's delay in seeking benefits on her behalf.

Once again, the precedent decision directly addresses the issue: "Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process." *Id.* at 223.

The waiver is not merely a release valve for an overloaded labor certification system, nor is it a shortcut for aliens from countries that tend to exceed their annual immigrant visa allotments. The national interest waiver is an additional immigration benefit, rather than simply a supplementary avenue of immigration. If we were to find that backlogs or looming expiration dates trigger the national interest waiver, then such a finding would create an incentive for last-minute filings; indeed, there would arguably be an incentive for frivolous filings intended solely to further overload the system. The general fact that the demand for visas among

Indian nationals exceeds the supply does not establish that this one particular alien qualifies for a national interest waiver.

Mr. Hernandez argues that the beneficiary's work is national in scope because "[h]igh-quality, first-class education has been one of the top priorities at the National Level," as shown by legislation such as the No Child Left Behind Act. At issue is not the national scope of education as a whole, but the national scope of the activities of one individual schoolteacher. Once again, Mr. Hernandez cites *Matter of New York State Dept. of Transportation* but fails to acknowledge that decision's specific discussion of the national scope (or rather the lack thereof) of the work of one schoolteacher.

Cheryl Henderson, an English Language Development Site leader and language instructor in the petitioning district, states: "I believe [the beneficiary's] influence is also important on a national level, particularly considering her experience from Missouri and Utah where there are so many Spanish-speaking English learners." The beneficiary's own travels or past experience are not what is meant by "national in scope." Whatever impact the beneficiary's work may have had in Missouri while the beneficiary was in Missouri, she ceased to have impact in Missouri when she moved to a different state.

Ken Johnson, president of the Association of Colton Educators, states that the beneficiary is a member of the California Teachers Association and the National Education Association and, as such, "is part of the larger picture dedicated to improving the teaching profession locally, statewide and nationally." The petitioner has not shown that the beneficiary is a national-level official of a national organization, or that her activities in particular within those organizations have had direct national impact. Therefore, her membership in a national organization does not inherently increase the national scope of her work. Once again, the issue is not the cumulative impact of thousands of teachers nationwide, but the impact of the beneficiary's own activities. The record does not indicate that the beneficiary has, for instance, formulated new educational policies or strategies that have been widely implemented outside the petitioning district.

The director denied the petition, reiterating the grounds specified in the notice of intent to deny, and finding that the petitioner has not shown that the beneficiary stands apart from other teachers in a way that warrants a special benefit (i.e., the waiver) for which most teachers do not qualify.

On appeal, counsel asserts: "The only way to have an impact upon education at a national level will be to have qualified, highly trained and capable teachers at the local level." This is a fallacious argument. A single individual can have a national impact on education in various ways, for instance by publishing influential research, by formulating techniques that other jurisdictions adopt as a model, or by serving as a top official of a national association or organization.

While staffing every school with highly qualified teachers would have a cumulative national effect, the petitioner has not shown that the approval of this petition would staff every school with highly qualified teachers. Rather, the approval of this petition would fill one position at one school. Counsel's argument thus implies that being a qualified teacher is, by itself, sufficient grounds for a national interest waiver. We reject this argument. By law, members of the professions holding an advanced degree are generally subject to the job offer requirement. Also by law, schoolteachers are members of the professions. Thus, to argue that

Congress did not intend for schoolteachers to be subject to the job offer requirement demands that we disregard the plain language of the Act. Congress has established no blanket waiver for schoolteachers. It has, however, established a labor certification process and annual limits for the number of new immigrants the United States will accept from each country. It defies reason to say that Congress intended the national interest waiver as a means for aliens to bypass the clearly-expressed intent of Congress.

Counsel then repeats the argument that a "critical shortage" of teachers justifies the national interest waiver. Leaving aside the relevant sections of *Matter of New York State Dept. of Transportation*, already cited elsewhere in this decision, we must note that the record contains no evidence to support the claim of a worker shortage. The labor certification process exists, in part, to test the labor market and verify that such shortages do, in fact, exist. The labor certification process is intended to remedy such shortages while curbing abuse by denying false claims of shortages. To base a waiver request on unsubstantiated claims of a shortage is, essentially, to request the benefits of a labor certification without meeting the burden of proof required to qualify for that labor certification.

Counsel also repeats the claim that the beneficiary should, in effect, be rewarded for coming from an oversubscribed nation (India). The beneficiary's nationality has nothing to do with her abilities or achievements as a teacher, and the petitioner has presented no evidence that Congress intended for nationality to play any role in the national interest waiver process. We note that the waiver, if approved, would not exempt the beneficiary from the annual numerical limitations on immigration from India.

Counsel concludes by arguing that the beneficiary's "employment within an under-served area demonstrates the beneficiary's potential to benefit the country on a 'national impact' level." Congress did, in fact, establish a blanket national interest waiver for certain physicians in medically underserved areas. *See* section 203(b)(2)(B)(ii) of the Act. The existence of this section of law demonstrates that Congress has the authority to establish blanket waivers for certain professionals in underserved areas. It remains that, to date, Congress has not created a comparable blanket waiver for teachers in underserved areas. We cannot conclude that such a waiver is implied in the general language of the statute.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.